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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 45.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 46.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants*,

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 47.

RAILROAD COMMISSION OF TEXAS, *Appellant*,

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 48.

SAVANNAH SUGAR REFINING CORPORATION, *Appellant*,

v.

THE UNITED STATES OF AMERICA, ET AL.

On Appeals from the United States District Court for the Northern District of Illinois.

PETITION OF TEXAS INTERESTS, APPELLANTS IN NOS. 46 AND 47, FOR REHEARING.

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Come now Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, appellants in Nos. 46 and 47, to hereby petition this

Court to reconsider its decision of January 2, 1951, in the four cases named in the caption hereof.

With Mr. Justice Douglas dissenting, the Court affirmed a decision of a statutory three-judge Court which had denied an injunction against an order of the Interstate Commerce Commission prescribing joint barge-rail rates, differentially lower than all-rail rates, between points in the greater Mississippi Valley, typical of which are rates from New Orleans, La., applying by barge up the river from New Orleans to Memphis, Tenn., and thence inland by rail to Wichita, Kans., or Oklahoma City, Okla.

In this proceeding the above named Texas interests had joined the railroads in contending that the order of the Commission prescribing the barge-rail rates was unlawful because it was the result of arbitrary, irrational and capricious action by the Commission, and because it unconstitutionally preferred the State of Louisiana over the State of Texas in violation of the ports-preference clause of the Federal Constitution and resulted in undue preference of New Orleans and undue prejudice to Galveston and Houston interests in violation of Section 3(1) of the Interstate Commerce Act.

Ordinarily, in view of this Court's reputation for thoroughness, care and devotion to duty, we would hesitate to file a petition for reconsideration. However, this case is particularly difficult. The many facts, contentions and issues are so complicated and interrelated and some of them so elusive, that it is impossible for anyone who has not lived with the case for a long time to fully grasp and readily envision the whole situation without losing sight of the bearing which each fact, contention and issue has upon the others. We accordingly think the Court will appreciate this effort to again bring the whole picture into proper perspective.

The main question is whether, under the national transportation policy declared in the opening paragraph of the Interstate Commerce Act, the Commission, in making rates,

may arbitrarily disregard costs and other transportation conditions where competing types of carriers, competing ports and different States are involved. The question is of vital importance, not merely in this case but in others now pending and many which are yet to come. In the public interest as well as our own, we ask the Court to please give this case second thought before having a momentous decision therein permanently spread upon the pages of history for the future guidance of carriers and regulating tribunals.

Apparently for some reason of policy other appellants are not filing a petition for rehearing. However, that does not disturb us, as we feel we are here showing good grounds for a new decision.

I.

Near the top of page 6 of its decision the Court seems to make a point of the fact that the barge lines are willing to absorb the differentials out of their own revenue and that therefore the railroads should not complain. But note the effect upon the barge lines. It makes their revenue so low that the private barge lines which have to pay their bills with their own money embargo the traffic as unprofitable. Without the embargoes, these lines or the barge shipping public not using the barge-rail service would have to bear the burden of paying the losses. To correct this situation without increasing the rates, the divisions received out of the joint rates by the barge lines would have to be greatly increased, probably making the divisions received by the rail lines confiscatory. In other words, the railroads would be called upon to greatly sacrifice their revenues for the sole purpose of feeding traffic to the barge-rail lines, whose rates give New Orleans an edge over Galveston and Houston; and do so by violating the declared national transportation policy which calls for the preservation of the railroads' advantages over the barge-rail lines in costs and other items. All this adds up to the fact that the prescribed

barge-rail rates are unlawfully low because the Commission has refused to consider cost in fixing them. Therefore we say we are entitled to a decision from this Court that the Commission misunderstood Sec. 307(d) of the Interstate Commerce Act, as Mr. Justice Douglas indicates in his dissent, and that its order is accordingly void.

II.

In the last sentence of the paragraph ending at the middle of page 6 the Court says "the railroads complain of competition". We see no indications of record that they complain of competition itself. Their briefs and argument make it plain that what they complain of is the *unfairness* and *unjustness* of the competition which the Commission has forced upon them arbitrarily and unlawfully. The declared national transportation policy, which it is the duty of this Court to enforce, guarantees to each form of transportation full security from any act of the Commission which deprives it of its competitive advantages or grants to a competing form any unnatural favors.

III.

Near the top of page 7 the Court speaks of the "principal worth" of the inferior service of the barge-rail routes. We submit that inferiority has no relative or absolute worth or advantage. No one desires inferior service, except those few shippers who on occasions seek slow movement in order to use the carriers' transportation facilities as free traveling storage warehouses and those who seek delay in transit in order that they may take advantage of a rising market in the hope that their goods upon arrival will bring higher prices than if shipped by more expeditious means. As to such shippers, the so-called inferior service is in fact superior service. It is contrary to public interest for the Commission to put a premium on poor service and it should be condemned as unlawful here because

it is out of consonance with, and violative of, the declared national transportation policy.

IV.

In the paragraph beginning at the bottom of page 7 the Court says the Commission may permit a carrier to accept a rate yielding low return if satisfied that the rate is compensatory, etc. On the next page the Court concludes that the differentials were considered by the Commission to be compensatory, meaning apparently that rates made by use of the differentials were considered compensatory. The barge lines, particularly the privately-owned lines, are in business for profit. The latter, at least, have found the traffic to be unprofitable and the Commission has been so informed. If the Commission saw evidence in the record which proved that the barge lines were mistaken and that the traffic *was* compensatory it should have identified that evidence, for we have a right to test the legal basis of a Commission decision in the Courts and the Courts in turn must know why the Commission acts as it does. *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 211. *Republic Aviation Corp.* v. *National L. Rel. Bd.*, 324 U. S. 793, 803. Furthermore, the mere fact that a rate may be compensatory does not necessarily mean that it is reasonable. Compensatory means that it is not confiscatory. There may be a wide difference between a compensatory rate and a reasonable rate. The Commission can lawfully prescribe only a reasonable rate. (Interstate Commerce Act, Secs. 1(5)(a) and 15(1).)

V.

In the last sentence of the paragraph ending at the middle of page 8 the Court states in effect that if the barge lines deem the prescribed rates to be less than relevant costs, a rate hearing is the proper forum to rectify the difficulty. This was evidently prompted by what was said

in our brief (p. 24) about the embargoes laid by the two privately owned barge lines against barge-rail traffic because they found it unprofitable, and by the statement made upon oral argument by counsel for the barge lines to the effect that if the Commission's order were sanctioned by this Court and if the barge-rail lines had to take this traffic, the Mississippi Valley Barge Line would ask the Commission to amend the order. Just what amendment would be asked was not stated, but it is naturally understood that what was meant was an amendment which would eliminate that barge line from the operation of the order or increase the prescribed rates very substantially, probably up to the all-rail level, not only to avoid confiscation, but to put the rates on a reasonable level as required by Secs. 1(5)(a) and 15(1) of the Interstate Commerce Act. No such statement was made on behalf of the American Barge Line Company, but we could logically expect that it would take the same action. What about the Federal Barge Line? It has no embargo against this traffic, although it appears to be in no position to handle it at a profit. This line being subsidized would from all indications continue to handle the traffic and thus permit the preferred New Orleans port interests to ship at confiscatory rates to the great detriment and undue prejudice of the competing Galveston and Houston port interests. Where does that leave us? As indicated in the dissent, the Commission seeks to foster the program of Congress for the Federal Barge Line without having the justifying facts in the record which the law requires, and therefore it is not only conceivable, but probable, that the Commission would take no action against the rates of the Federal Barge Line. We here call attention to the statement in the dissent that the reason for the Commission's refusal to pursue the cost study into recent years is apparent. It is also conceivable that the Commission might not amend its order, even as to the two private barge lines, but arbitrarily say that the prescribed rates are reasonable, that the losses suffered by

the barge lines may flow from inadequate and unreasonably low divisions received by them out of the prescribed joint rates, and that therefore the remedy lies in the barge lines, filing of a formal complaint with the Commission to test the reasonableness of the divisions. In the circumstances described, Galveston and Houston would likely have to wait for years for relief that might never come. Cost studies, extended hearings, voluminous briefs, proposed reports, exceptions, replies to exceptions, oral argument and Court proceedings could keep the situation in a state of flux. Note in this connection that over 16 years have elapsed since the institution of the Commission's proceeding now before this Court and it is still unsettled.

What we are getting at right here is this: We have this case pending before this Court in which we have shown that New Orleans is unlawfully preferred to the detriment of the Texas interests, but in which the Commission has arbitrarily refused to grant corrective action. We submit that it is the duty of this Court to enjoin the Commission's order and direct the District Court to send the case back to the Commission instead of leaving it up to the barge lines to determine when, if ever, they will go to the Commission for an amended order and then perhaps get no relief.

We urge that where an administrative body violates the law, parties suffering legal wrong have a right to an injunction at once to avoid irreparable injury that would result form that body's order. Damage done by undue preference is generally irreparable. Where unduly preferential rates are charged there is as a practical matter, little if any hope of reparation for damages done thereby, for the requirements, *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, are so drastic that it is almost always impossible for a shipper to prove satisfactorily the amount of his claim. The situation is entirely different from one in which unreasonably high rates are charged, for there the shipper can generally obtain reparation by proving that he paid the freight charges.

We have entertained the fond hope that the Court would direct that an injunction issue against the Commission's order for the future rates; also that the case be remanded to the Commission for proper action, that action to be the immediate issuance of an order upon the present record permitting the cancellation of the existing barge-rail rates prescribed years ago, without a hearing. The existing rates are based on the traditional belief once held that barge-rail costs were less than all-rail costs. Although the Denison Act under which these rates were prescribed has been repealed, they are held in effect until the further order of the Commission by Sec. 320(e), Subsection (e) of Sec. 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended. (U.S.C. title 49, Sec. 153(e). Obviously, if there is no justification for the newly prescribed rates there is none for the existing rates.

Something that is difficult to understand is the way the Commission, after nonchalantly prescribing these rates, is now trying to defend them when it knows that the barge lines which are free to operate according to accepted, common sense, business standards, do not want the traffic, because they find it unprofitable. The law provides a remedy for such arbitrary action and puts that remedy in the hands of this Court. We respectfully pray for its immediate use.

VI.

In the paragraph ending near the middle of page 8 the Court says that it appears that the Commission substantially adopted the proposals of the barge lines. These proposals, which were self-serving declarations, were merely indications of what the barge lines wanted when they offered them. They have little, if any, probative value as against opposing parties. Moreover, they were made before the general level of rates necessary to produce reasonable revenue was increased something like 60 percent due to the increased costs which followed the war and which are still on the up-grade. The Commission was arbitrary in

using them as bases for future rates. The present embargoes are proof that the privately-owned barge lines would not propose these differentials today. In fact, if any barge-line operator wants them for the future he should be required to say why.

VII.

In the paragraph beginning at the middle of page 8 the Court speaks of the willingness of the barge lines to accept less for the inferior service than the all-rail lines charge for better service. The indications are that it is only the subsidized line which is willing to generally accept less, for the privately-owned lines have embargoed the traffic.

VIII.

In the same paragraph the Court says there is no provision in the statute making relative costs the sole and controlling consideration. The national transportation policy calls for the preservation of the advantages of each separate form of carriage. The all-rail routes must certainly have a natural advantage in cost for they are willing to handle traffic at their present rates, while the privately-owned barge lines find it unprofitable. As already pointed out the Commission's disregard of costs in this case has resulted in rates which the Mississippi Valley Barge Line stated upon oral argument it would resist. This illustrates the fallacy of disregarding cost where two competing forms of carriage are involved. We contended in our brief that it should not be assumed that deduction of the differentials from the depressed all-rail rates would result in reasonable and compensatory barge-rail rates.

IX.

Near the top of page 9 the Court says the railroads desire to eliminate competition through increases in the barge-rail rates. They are not trying to get rates increased which

should not be increased. All they are seeking to do is to get rid of competitive rates which the Commission has imposed upon them through what they say and we say was a misunderstanding or misapplication of the law. If correct understanding and application of the law causes increases, right will have prevailed.

X.

Below the middle of page 9 the Court says the Commission was bound to consider Congressional policy. That is true, but only so far as the record and the substantive provisions of the statute permit and justify. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *United States* v. *New York Central R. Co.*, 263 U. S. 603. In other words, the Commission has no duty or power to carry out wishes of Congress independent of a formal record which furnishes a lawful basis. It can do nothing in furtherance of Congressional policy except in so far as it has authority under and in conformity with the substantive provisions of the Interstate Commerce Act respecting reasonable, nondiscriminatory and non-preferential rates. It can do no more because of the policy of Congress than it could otherwise.

There is every indication in the Commission's report that the real or dominant reason for prescribing the barge-rail rates was its belief that that was required by Congressional policy. The policy of Congress respecting barge-rail rates is reflected in Sec. 3 (c) of the Inland Waterways Corporation Act, enacted many years ago when it was believed that barge-rail transportation costs were lower than all-rail costs. It provides that the transportation services of the Federal Barge Line are to be continued until barge-rail rates are established *reasonably fair to both rail and water carriers*. This is anything but an absolute and unqualified requirement that barge-rail rates of the sort prescribed by the Commission in this case shall be prescribed and established. The meaning of "reasonably fair to both

rail and water carriers" is defined in the declaration of the national transportation policy. In other words, in carrying out the old policy in respect of water carriers the Commission can not lawfully violate the broad policy declared in 1940 covering the whole transportation problem. The Commission, instead of conforming to the declared policy, has required the barge-rail lines to engage in destructive competition with the railroads. Such competition is unlawful. *Eastern-Central Assn.* v. *United States*, 321 U. S. 194; p. 206.

XI.

At pages 10 and 11 the Court disposes of *I. C. C.* v. *Mechling*, 330 U. S. 567. We do not contend that the *Mechling* case involves the same factual situation as this case, but the Court there held, in effect, that the railroads, as connections of barge lines, could not manipulate their transportation charges for the purpose and effect of depriving the barge lines of traffic. In the present case we see the Commission using the barge lines' vicious differential absorption device as a means of driving traffic to the barge-rail lines as against the all-rail lines. The *Mechling* rule would be a poor rule if it did not work both ways.

XII.

Near the top of page 11 the Court says differentials for barge service do not constitute an unjust discrimination against the railroads, by express proviso of Sec. 305(c) of the Act. However, that Section applies only to all-water transportation. Sec. 3(1) does not contain that proviso and Sec. 3(1) is in Part One of the Act, which specifically applies to water-rail as well as all-rail transportation, as indicated in Sec. 1(a) thereof.

XIII.

In the paragraph beginning near the top of page 11 the Court says the inherent advantage of the railroads is su-

periority of service. That is just one element of advantage. Another is cost. When the Commission, as in this case, forces the railroads to join the barge lines in differential rates solely because of inferior service, the differentials offset the superior service and deprive the railroads of their advantage in violation of the transportation policy and all considerations of fair and lawful treatment.

XIV.

In the same paragraph reference is made to Pullman passenger service versus "milk-run" service. The main reason for charging more for the former is that speed and the movement of beautiful and heavy equipment cost the carriers a lot more than does the operation of a light train made up of cheap old coaches good for nothing else.

XV.

In the paragraph beginning at the middle of page 12 the Court states that the only point urged by the Texas appellants not already answered is that the Commission's order gives New Orleans a preference over other ports. We here call attention to the paragraph beginning at page 31 of our brief, where the contention is made that the barge-rail rates are unduly preferential of New Orleans and unduly prejudicial to Galveston and Houston in violation of Sec. 3(1) of the Interstate Commerce Act. Presently we shall also call attention to the chapter directly related thereto which begins on page 34 of our brief, which shows how the Commission made the barge-rail rates for New Orleans arbitrarily low and did not protect Galveston and Houston from the adverse effects of this legal error. The chapter covering undue preference and prejudice is supported in large part by this later chapter. The two may be considered together.

The barge-rail routes to many of the most important points in the West are very circuitous. For example, the

route from New Orleans to Oklahoma City, Okla., is by barge northward up the river to Memphis and thence by rail westward. The river portion of the through distance is 748 miles and the rail portion 485 miles. It was shown at the hearing before the Commission that import commodity barge-rail rates from New Orleans to Oklahoma City were lower than those by rail from Houston to Oklahoma City, although the rail distance from Memphis to Oklahoma City is 20 miles greater than rail distances from Houston to Oklahoma City. (Distances are taken from pages 2 and 6, Exhibit 1033, I. C. C. Record.) The Commission, in dealing with the matter of rate relations and undue preference of New Orleans, said in its report that such situations as that just described could not be defended. (270 I. C. C. 591, at p. 617. R. 50.) In finding 2, which prescribes the general basis for barge-rail commodity rates (274 I. C. C. 229, at p. 230, R. 76), the Commission wrote a proviso that New Orleans was not to get a lower barge-rail commodity rate than Galveston or Houston where the rail portion of the barge-rail distance exceeded the distance from Galveston or Houston to destination. In other words, the Commission held that since the railroads have to perform even more service in connection with barge-rail via Memphis than they do via rail from the Texas ports, it would not require any lower barge-rail rates from New Orleans than might apply all-rail from the Texas ports. This proviso of course makes the barge-rail rates higher than they would be under the strict application of the general basis just mentioned. However, as the proviso recognizes only the rail portion of the through haul, it disregards the barge portion altogether. This is arbitrary action and nothing else. New Orleans and the affected interior points thereby get much lower barge-rail rates than they would if the barge portion of the haul were also taken into account. It will thus be seen that the Commission proceeds to test the rights of the Texas ports under Section 3(1) of the Interstate Commerce Act by comparison of the whole

of the transportation service from Galveston and Houston to the interior with only the rail portion of the barge-rail service from New Orleans. Had the Commission added a reasonable figure to represent the transportation by barge up to Memphis, the barge-rail rates would have been much higher than the rail rates from Houston. The arbitrary action of the Commission in the respect above described adversely affects not only the particular destination where the distances are greater from Memphis than from Houston, but many points east of that destination until the point is reached where a barge-rail equated distance from New Orleans to destination would become less than the rail distance from Houston. At a point about 10 miles east of Oklahoma City the distance from Memphis becomes less than that from Houston and under the Commission's decision gets a lower rate from New Orleans than applies from Houston. In a previous case, *Inland Waterways Corp., through Routes and Rates*, 192 I. C. C. 663, the Commission equated water distances to rail distances without cost data, but it arbitrarily failed to do so here where there was a mass of good evidence as to relative costs. It is the arbitrary disregard of the barge haul to Memphis which accords New Orleans such preferential rates instead of rates based on geography and transportation conditions, which rates would considerably exceed the rates from Houston either *per se* or equated distance considered. Thus New Orleans is given artificial advantages, while Galveston and Houston are deprived of their advantages of location. As the Court pointed out in the concluding paragraph of its decision in this case, the law does not attempt to equalize fortune, opportunities or abilities. Natural advantages are to be preserved.

Promptly after the Commission handed down its first decision we filed a petition for modification of Findings 1 and 2 in respect of the above matter, but to no avail, the Commission saying that it did not have the necessary evidence. If it did not have such evidence it should not have

prescribed the rates, for under the Interstate Commerce Act it may lawfully prescribe only such barge-rail rates as it may find to be justified on the facts of record. How in the world can anyone decide whether a rate is reasonable if he considers merely the mileage for a fragment of the haul instead of the transportation conditions involved in the through haul?

We undertook to deal fully with the proviso in the chapter above mentioned, entitled "Finding 2 is Arbitrary", beginning at page 34 of our brief. However, it presents a very technical and complicated question and we thought best to here spell out the whole situation in new language to make it easier for the Court to see the vital bearing the proviso has upon the issue of undue preference and prejudice. It involves a matter of law on which the Court should certainly pass in this case.

We submit that it is clear that the Commission has required the barge-rail lines to give New Orleans unduly preferential rates to the prejudice of Galveston and Houston in violation of Section 3(1) of the Interstate Commerce Act. It has required these rates to be made by deducting the differentials from New Orleans all-rail export and import rates, which to the most important points are depressed to the level of the Galveston-Houston all-rail rates regardless of the greater distances from New Orleans. Let us again take, as an example, Oklahoma City, served by the "Rock Island." This road has a line from Galveston and Houston to Oklahoma City and one from Memphis to Oklahoma City. It has its own all-rail rates from Galveston and Houston to Oklahoma City, and at the same time is an effective participant in the prescribed barge-rail rates from New Orleans within the meaning of *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, p. 650, coupled with *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136. This fact furnishes the legal basis for a finding of undue preference which the Commission failed to make. Not only did it thus fail, but it actually ordered the sort of undue

preference and prejudice which Section 3(1) of the Interstate Commerce Act under the decisions just cited condemns.

Ports are specifically named in Section 3(1) of the Interstate Commerce Act along with localities, persons, firms, corporation, etc., entitled to its protection. They were not originally included by specific mention, but were brought in by an amendment in 1935. This amendment was enacted quickly after this Court in a 5 to 4 decision, with vigorous dissents, had held in *Texas & Pac. Ry. Co.* v. *United States*, *supra*, at p. 638, that Section 3(1) was not intended to cover ports as respects traffic passing through them. The cited case was one in which Galveston was seeking the removal of preferences accorded New Orlaens by all-rail rates to and from the interior Southwest.

The proceeding in which the Commission prescribed the barge-rail rates was a general investigation of the kind authorized in Section 13(2) of the Interstate Commerce Act. As stated in the third paragraph of the Commission's first report it was an investigation into the reasonableness and *lawfulness otherwise* of the barge-rail rates. To be lawful a rate must be non-preferential and non-prejudicial as well as reasonable. At one of the hearings the Texas port interests offered evidence showing the rate advantages enjoyed by New Orleans and proved the detrimental commercial and economic effect thereof upon Galveston and Houston. (See pages 9 and 10 of our last brief.) In view of the above facts, if the barge-rail rates were otherwise justified, the Commission should have made a finding of undue preference of New Orleans and undue prejudice to Galveston and Houston and conditioned the establishment of the barge-rail rates upon a contemporaneous establishment of all-rail rates for Galveston and Houston properly related to the prescribed barge-rail rates for New Orleans. It was arbitrary and irrational in not doing so.

XVI.

At the bottom of page 12, in dealing with the ports-preference matter under the Federal Constitution, the Court quotes from *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131, where it was held that the limitations specified in the Constitution on the power of Congress were set to prevent preference as between States in respect of their ports or in respect of the entry and clearance of vessels. What we are complaining about here is preference of the State of Louisiana over the State of Texas. The Railroad Commission of Texas, an instrument of the sovereign State, is the appellant in No. 47. For the welfare of its citizenry, whose interests are affected by the prosperity and development of the Texas ports, the State insists that it is entitled to non-prejudicial treatment at the hands of the Commission in the matter of rate relations.

The quotation just referred to says in the last sentence that Congress causes many things to be done that benefit particular ports to the disadvantage of other ports in neighboring States. However, the present proceeding does not involve anything that Congress has directly caused to be done. It involves only what the Commission has done, and the Commission has no power to do anything in respect of barge-rail rates except what the proven facts on a formal record justify.

We further submit that rate preferences for ports and for states having ports are in the same category as rules and regulations regarding the entry and clearance of vessels. See the appendix to this petition, which covers debates in the Constitutional Convention in the light of which the Constitution was written and adopted. Particular attention is called to the last paragraph of the propositions submitted by Mr. McHenry and Gen. Pickney, which called for uniformity at all ports in the matters of duties, imposts and excise, prohibitions or restraints, laid or made

by Congress. Section 8 of the Constitution requires that all duties, imposts and excises shall be uniform throughout the United States. We urge that the paragraph from the *Louisiana Public Service* case, *supra*, quoted at the bottom of page 12 of the Court's decision herein, does not rule out such things as duties, imposts and prohibitions of preference in rates. Moreover, that case was in no way similar to the present case. This is readily apparent upon examination.

It was well settled long ago that the Constitution was not to be construed strictly, like a criminal law, but in the very broadest way. What the Constitution provides is principles, guarantys, prohibitions, etc., stated in general terms for the benefit of present and unborn generations and for application to present and future inventions and developments. Witness for example what the Court has extended the term "interstate commerce" to mean in modern times. When the Constitution was adopted there were no railroads and no freight rates to prefer or prejudice particular States or ports. But there were the matters of regulations affecting the entry and clearance of vessels and the imposition of duties. The principles which were then outlined for application thereto are symbols, samples and precedents for use now as guides in dealing with things that affect the public in substantially the same way as discriminations respecting the other things just mentioned. Consequently, we were surprised by the holding of the Court in this case that the ports-preference clause of the Constitution should be confined narrowly to such things as the entry and clearance of vessels, which are not even mentioned in the clause. The clause referred to mentions "Regulations of Commerce or Revenue" without qualifications. The prohibition of preference respecting commerce and revenue is in a separate sentence from that respecting the entry and clearance of vessels and the payment of duties by vessels. Let us here turn to *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, where this Court, after discussion of the

clause in question and mentioning legislation respecting the entry and clearance of vessels, held that the clause "may, certainly, embrace any other description of legislation looking to a direct privilege or preference of the ports of one State over those of another." We ask the Court to please re-read carefully pages 433 to 435 of that decision and the chapter that begins at page 32 of our brief. The amendment to the Interstate Commerce Act dealt with above in XV in connection with the matter of undue preference and prejudice under Section 3(1) of that Act shows that Congress is deeply concerned about matters of port preference, just as was the Constitutional Convention. Congress itself may have a right to disregard costs in rate making but if it does it may not arbitrarily treat one section of the country or particular points better than others. Suppose Congress should enact a simple-worded law to the effect that the ports of the State of Louisiana should be favored with rates 25 percent less than those for ports of the State of Texas for equal distances regardless of transportation operating costs. Could any reasonable-minded person believe that this Court would hesitate to declare the legislation unconstitutional? And yet it has, in principle and practical effect done just that in this case.

We submit that the only preferences, which under the Constitution Congress may arbitrarily give particular ports or particular States having the ports, are in respect of physical matters, governed primarily by geography, population, areas of production and consumption, etc., and including such things as the establishing of ports, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic. See *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, p. 435; and *Armour Packing Co.* v. *United States*, 209 U. S. 58, p. 80.

XVII.

In the concluding sentence of its decision the Court holds that if there is preference to New Orleans it is geographical and not due to the Commission's action. We ask the Court to take a second thought and decide again whether New Orleans has any natural advantage by being located at a point served by barge lines which cannot handle this traffic except at a loss and which, when they do handle it, give slow service and smash up so many packages in interchanging the traffic with the railroads at the river-landing transfer points. It is Galveston and Houston which have the natural advantage, for the railroads serving them can perform the service of transportation cheaper mile-for-mile than the barge-rail routes serving New Orleans. The only advantages New Orleans has is the result of the Commission's requirement that the barge lines join the railroads in rates made confiscatory by application of the value-of-service element. When the Commission decided its case it had reasonable indications of the fact that the barge lines considered the traffic unprofitable (see 270 I.C.C. 591, p. 606. R. 35) and it was therefore arbitrary for the Commission to order the rates into effect. Poor service is no justification under such circumstances. The Interstate Commerce Act, through the minimum-rate power, prohibits rates that are not compensatory or not up to a reasonable level and it was the duty of the Commission to find that the existing rates were less than reasonable minima and condemn them; also that rates such as were prescribed for the future would likewise violate the law. By the prescription of rates for New Orleans which are less than reasonable minima the Government gives that port and the State of Louisiana advantages they are not naturally entitled to whether considered alone or as competitors of Galveston and Houston and the State of Texas.

We submit that we have proved a perfectly good case of undue preference of New Orleans and the State of Louisi-

ana and undue prejudice to Galveston and Houston and the State of Texas in violation of Section 3(1) of the Interstate Commerce Act and the Constitution.

XVIII.

The substance of the dissent of Mr. Justice Douglas is that only Congress may disregard cost. We say that if Congress had ever intended to delegate such a fundamental power, assuming that it could have done that constitutionally, it would certainly have said so in unmistakable language. Further, it is difficult to believe that Congress would ever want to place in the hands of a subordinate body such a dangerous power. We see in this case the unfortunate results of ignoring cost. The Mississippi Valley Barge Line's announcement upon oral argument is very revealing in that respect. We submit that under the ports-preference clause of the Constitution, even Congress can not disregard cost where ports are concerned, for we feel sure that rates are within the prohibition. But assuming that Congress may disregard cost the Justice is eminently correct in saying that the Commission may not do so. The Commission is bound to govern itself by the declared national transportation policy and the formal record.

We pray the Court to reopen the case, reverse its decision, and direct the issuance of an injunction and remand of the case to the Commission for appropriate action. Should the Court decide not to enjoin the order in its entirety, we ask that it be enjoined at least insofar as it relates to export and import rates between New Orleans and points west of the Mississippi River. The vast structure of domestic rates in the area between the Rocky and Allegheny Mountains need not be disturbed in

order to afford the Texas ports the protection they feel sure they are entitled to under Sec. 3(1) of the Interstate Commerce Act as to export and import rates.

Respectfully submitted,

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January 29, 1951.

Certificates.

Counsel hereby certify that this petition is presented in good faith and not for delay.

PRICE DANIEL,

WM. A. DISQUE.

I hereby certify that I have today served a copy of this petition on counsel for all parties of record in these proceedings by first-class mail.

WM. A. DISQUE.

January 29, 1951.

APPENDIX.

The following is a copy of what was said on the floor of the Constitutional Convention on Saturday, August 25, 1787, respecting discriminations against States in the Matter of port treatment. It is taken from Pages 478 and 479 of Elliott's Debates on the Federal Constitution:

Mr. CARROLL and Mr. L. MARTIN expressed their apprehensions, and the probable apprehensions of their constituents, that under the power of regulating trade the General Legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat; as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc. They moved the following proposition:

> "The Legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another."

Mr. GORHAM thought such a precaution unnecessary; and that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States without being required to enter, with the opportunity of landing and selling their cargoes by the way.

Mr. MCHENRY and Gen. PINCKNEY made the following propositions:

> "Should it be judged expedient by the Legislature of the United States, that one or more ports for collecting duties or imposts, other than those ports of entrance and clearance already established by the respective States, should be established, the Legislature of the United States shall signify the same to the Executives of the respective States ascertaining the

number of such ports judged necessary, to be laid by the said Executives before the Legislatures of the States at their next session; and the Legislatures of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any State, except the Legislature of such State shall neglect to fix and establish the same during their first session to be held after such notification by the Legislature of the United States to the Executive of such State.

"All duties, imposts and excise, prohibitions or restraints, laid or made by the Legislature of the United States, shall be uniform and equal throughout the United States."

These several propositions were referred, *nem. con.*, to a committee composed of a member from each State. The Committee appointed by ballot, were Mr. LANGDON, Mr. GORHAM, Mr. SHERMAN, Mr. DAYTON, Mr. FITZSIMONS, Mr. READ, Mr. CARROLL, Mr. MASON, Mr. WILLIAMSON, Mr. BUTLER, Mr. FEW.